



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CRIMINAL APPEAL NO. 63 OF 2017

EVANS OUMA OKETCH..... APPELLANT

VERSUS

REPUBLIC.....PROSECUTION

(Appeal from the judgment, conviction and sentence in the Principal Magistrate's Court at Bondo in criminal case No. 921 of 2016 dated 5th July 2017 by Hon. M. Obiero, Principal magistrate)

JUDGMENT

1. The appellant herein **EVANS OUMA OKETCH** was charged with the offence of defilement contrary to section 8(1) as read with Section 8(3) of the Sexual offence Act No. 3 OF 2006. It was alleged that on the 8th day of August 2016 at about 9.00pm, at [particulars withheld] beach, Usenge sub-location in Bondo sub-county within Siaya County, he unlawfully and intentionally caused his penis to penetrate the vagina of BAO [full name withheld] a child aged 12 years.

2. The appellant further faced an alternative charge of committing an indecent act with a child contrary to Section 11(1) of the Sexual Offences Act No 3 OF 2006. It was alleged that on the 8th day of August 2016 at around 9.00pm at [particulars withheld] beach in Usenge sub-location in Bondo sub-county within Siaya County he intentionally touched the vagina and breasts of BAO a child aged 13 years with his penis and hand.

3. The appellant denied the charges and the prosecution called four (4) witnesses who testified in support of their case. The trial court found the appellant guilty of the main charge and sentenced him to serve 20 years imprisonment.

4. Aggrieved by the said judgment, conviction and sentence, the appellant filed this appeal on 14th July 2017 setting out the following grounds of appeal:

- i. That the learned trial Court Magistrate erred in law and fact by failing to observe that the evidence adduced was insufficient to warrant a sound conviction.*
- ii. That the learned trial Magistrate erred in law and fact by failing to observe the provision of Article 50(2)(c) of the Constitution of Kenya.*
- iii. That the Learned trial Magistrate erred in law and fact by failing to find that the Prosecution's evidence was scanty and insufficient to uphold a sound trial and conviction thereof.*
- iv. That I cannot recall all that transverse during the trial hence pray for the trial records to adduce sufficient grounds at the hearing thereof.*
- v. That I pray for orders of habeas corpus.*

5. In determining this appeal, this Court is alive to the principles laid down in ***Okeno Vs. Republic [1972] E.A. 32*** that an Appellant on a first appeal is entitled to expect the evidence as a whole to be subjected to a fresh and exhaustive examination (*see also Pandya Versus Republic [1957] E.A. 336*) and to the Appellate Courts own decision on the evidence, the first Appellate Court must itself weigh conflicting evidence and draw its own conclusions.

6. Further in ***Shantilal M. Ruwala Versus Republic [1957] East Africa 570*** it was held that it is not the function of a first Appellate Court merely to scrutinize the evidence to see if there was some evidence to support the Lower Court's findings and conclusions, it must make its own findings and draw its own conclusions, only then can it decide whether the Magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses. (*See Peters Versus Sunday*)

7. Examining the evidence adduced before the trial court, **PW1, B.A.O** gave evidence on oath after voir dire examination and stated that on the 8th day of August 2016 at about 9 00 pm, she was from the bath room where she had gone to take bath. While she was passing near the appellant's house, the appellant called her and she went into his house. While inside the house, the appellant had sexual intercourse with her. In the process, she heard somebody knocking on the door and she also heard the voice of her mother. The door was forced open and she saw her mother and police officers. She stated that both her and the appellant were arrested and escorted to Usenge police Station. She was later escorted to Got Agulu Hospital where she was treated and examined.

8. On cross-examination, PW1 stated that during the incident, she did not cry and she did not scream for help.

9. **PW2, JAO** testified that the complainant herein PW1 is her daughter. She stated that on the 8th day of August 2016 at about 9.00 pm, she was going to her house, in the company of her sister and on reaching the house, they realized that the complainant was not there. They decided to go and look for her. PW2 went back to the kitchen but she did not find her. When she was going back to the house, she heard somebody crying inside EVAN's house. She realized that the voice was that of the complainant, her daughter so she sent her sister to go and inform the complainant's father and after a short time, the complainant's father joined them with police officers.

10. She further stated that the police officers pushed the door down and when it opened, they found the appellant and the complainant lying on the ground. The two were arrested and escorted to the administration police camp and later to Usenge police station. The following day, PW2 took the complainant to Got Agulu Hospital where she was examined and treated.

11. PW3, that is **PC(W) NANCY WAMBOI** testified that she investigated the case. She stated that on the 9th day of August 2016 at about 12.00 pm, she was on duty when she accompanied CPL Wafula to Uhanya where they found the complainant and the appellant who had been arrested by administration police officers. They collected the two and took them to Usenge police station. She stated that she interviewed the complainant who explained to him that the appellant defiled her in his house on the 8th day of August 2016 at about 9.00 pm. She further stated that the following day in the morning, she escorted both the complainant and the appellant to Got Agulu Hospital where they were both treated and examined. It was her further testimony that she later took the complainant to the Hospital for age assessment and she received the report in respect of the age assessment and she produced the same as exhibit 4.

12. **PW4 MARUTI LAWRENCE** a Clinical Officer attached to Got Agulu Hospital testified that on the 9th day of August 2016, he received both the complainant and the appellant at the Hospital. He examined both of them and filled for them the P3 forms. He stated that when he examined the complainant's genitalia, he noted that there was severe bruising of the labia majora and labia minora. He formed the opinion that there was penetrating sexual activity. He produced the two P3 forms in respect of the complainant and the appellant as exhibits 2 and 3 respectively.

13. At the close of the prosecution case, the appellant gave sworn evidence. He stated that no incident happened on the 8th day of August 2016. He stated that he was arrested on 9.8.2016. He denied having defiled the complainant.

14. In support of this appeal, the appellant submitted in writing and orally. He maintained that he did not commit the offence and that the police and the complainant's father who arrested him did not testify.

15. Opposing the appeal, Mr. Ngetich prosecution Counsel for the Respondent submitted that the appellant was properly convicted as there was sufficient evidence adduced against him. Further, that all the ingredients of the offence of defilement were established beyond reasonable doubt and relevant witnesses were called. He further submitted that from the evidence on record, PW2 went to the appellant's house in the company of the police and found the appellant with the minor. Counsel maintained that the identity of the appellant by the minor and PW2 was not in doubt. He also submitted that there was fair hearing and that the appellant was given time to prepare for his defence and was given statements of witnesses. He urged the court to dismiss the petition of appeal.

16. In a brief rejoinder, the appellant submitted that PW2 knew him because of his work as a fisherman and that she owed him money for the fish that she had taken from the appellant.

DETERMINATION

17. I have considered and reevaluated the evidence adduced by the prosecution's witnesses, the defence tendered by the appellant and the circumstances of this case. In my humble view, the main issue for determination is whether the prosecution proved beyond reasonable doubt the guilt of the appellant for the offence of defilement against the complainant.

18. To resolve the above issue, this court must determine whether the elements of defilement were proved to the standard required by law. The elements are that there must be proof of penetration as defined in section 2 of the Sexual Offences Act; the perpetrator must be positively identified and there must be proof of the age of the complainant which must be that she is a child and this case, within the age bracket of section 8(3) of the Sexual Offences Act, for purposes of punishment upon conviction.

19. In the instant case, the evidence adduced by PW1 the complainant after voir dire examination to establish her competency to be sworn and to testify is that she was a class seven pupil at **R. Primary School**, [full name withheld]. She stated that she was aged 14 years at the material time as she was born in 2004. She recalled that on the 8th day of August 2016 at about 9pm she had gone to take a bath at a bathroom and on her way back to their house, she passed near the door of the appellant whom she called **Evans** and he called her so she entered his house. He instructed her to sit on the chair but she refused so he told her that he wanted to have sex with her. She refused and decided to leave. He grabbed her back into his house, and that he was in the company of another boy who was sleeping on the mat. That he removed her skirt as he undressed his trousers then he inserted his penis into her vagina. She felt pain as it was her first time to experience

and that he defiled her for about two hours. In the process, the complainant heard a knock on the door but the appellant refused to open. She heard her mother's voice and the appellant opened the door. Her mother and a police officer entered the house and arrested both the appellant and the complainant and escorted them to Usenge Police Station. Later she was taken to Agulu Hospital for examination and treatment. She stated that she knew the appellant very well as they used to live in the same compound.

20. The above testimony was not shaken in cross examination.

21. PW2 who was the mother to PW1 testified how on the material night and time her daughter went to bath but did not return and ongoing to check on her whereabouts, she did not find her but as PW2 returned to her house, she heard the voice of the complainant crying from the appellant's house so she alerted her sister who called PW1's father. The father informed the police and together with PW2 they went and found the appellant and the complainant sleeping in the appellant's house on the ground. They arrested them and escorted them to the police and the following day she escorted PW1 to Hospital where she was treated and examined and a P3 form was later filled. She stated that she knew the appellant because he was a neighbour and that he had lived with the complainant's family for long.

22. PW2 maintained her testimony in cross examination saying that the appellant's house was between her bathroom and her main house. She stated that she stood at the appellant's house door and waited for the complainant's father who came with police officers who pushed the door to his house and it opened. She stated that he was a fisherman and that she did the business of selling fish. PW2 denied having any relationship with the appellant. She also denied a suggestion that she had a grudge with the appellant.

23. PW3 investigated the case and charged the appellant with the offence, after obtaining a P3 form for the complainant and the age assessment report which were all produced in evidence as exhibits. The age assessment report dated 12th October 2016 showed that the complainant was 13 years old at the material time. PW3 is also the Police Officer who received the appellant and the complainant after the two were arrested from the appellant's house on the material night as testified by PW1 and PW2.

24. PW4 Maruti Lawrence the Clinical Officer based at Got Agulu Sub County Hospital received and examined both the complainant and the appellant on 9/8/2016. He found that PW1 had severe bruises on her labia minora. He also found that there was evidence of penetrative sexual activity. He produced the P3 forms for the complainant and the appellant as exhibits.

25. The appellant denied committing the offence and could not recall what happened on the alleged material night save that he recalled his arrest on 9/8/2016 at 4 pm while he was alone claiming the people who arrested him stated that he had a relationship with PW2 which he denied and told them that PW2 owed him money for fish supplied to her. He stated that the complainant was her neighbor.

26. In my humble view, the above evidence on record clearly show that there was penetration of the complainant's genitalia, that the complainant's age was proved to be 13 years old as per the charge sheet and that the perpetrator was a well-known person to the complainant and PW2 as they were close neighbours. PW2's evidence on how the appellant was arrested clearly puts him at the crime scene as narrated by PW1 on how she was accosted on her way back to her house from taking a bath at a nearby bathroom.

27. Although the complainant's father was not called as a witness being the person who went with police officers to the appellant's house upon being alerted by PW2 through the latter's sister and although the arresting officer was not called as a witness, the evidence of PW1, PW2 and PW3 was corroborative of the offence of defilement of PW1 and there is nothing on record to suggest that the prosecution witnesses could have been lying. The trial court heard and saw these witnesses testify and believed their testimonies to be truthful. I have no reason to differ with his finding. The trial magistrate also analyzed the minor contradictions in the evidence of PW1 and PW2 on whether the complainant was heard crying from the appellant's house as stated by PW2 or whether PW1 did not cry or raise any alarm and he in my view correctly found that the inconsistencies did not go to the root of the prosecution's case. The bottom line is that the complainant's mother was concerned about her child missing from the house after she went to take a bath and she went looking for her. She later found PW1 locked up in the appellant's house. The trial magistrate properly analyzed the evidence on record and resolved all the inconsistencies apparent which did not go to the root of the case so as to vitiate the appellant's conviction.

28. The fact that the arresting officer and the father to the complainant were not called as witnesses in my view did not vitiate the trial as the evidence adduced by the prosecution witnesses was sufficient enough to sustain the conviction of the appellant for the offence and there was nothing to suggest that had the two witnesses been called they could have given evidence adverse to that of the other witnesses. The defence by the appellant in my view was made up to escape justice as PW1 and PW2 were clear on how the appellant was arrested and handed over to the nearest AP Camp at Utonga police and collected by PW3 who rearrested him and had him charged with the offence.

29. Albeit the appellant claimed that he was arrested on 9/8/2016 at 4pm, PW3 was clear that they went to collect the appellant at 12 noon on 9/8/2016 after he was arrested and taken to Utonga AP Camp after being found in his house with the complainant by PW2 and her husband in the company of police officers and that he was lying on the ground with her daughter the complainant herein.

30. On the whole, I am satisfied that the prosecution proved all the elements of defilement against the appellant beyond reasonable doubt and that his conviction by the trial court was safe and sound. I uphold the appellant's conviction and dismiss the appeal against conviction.

31. On the sentence meted out, the appellant was said to be a first offender and he pleaded for leniency in mitigation. He was handed minimum mandatory penalty of 20 years imprisonment which is prescribed by section 8(3) of the Sexual Offences Act. However, on the authority of **Jared Koita Injiri v Republic [2019]e KLR**, while appreciating that the offence committed was heinous, I order for a social inquiry report to be filed by Siaya County Probation Officer to guide this court on whether to interfere with the sentence meted out and if so, to what extent. The Probation officer to interview the complainant and obtain her victim impact statement in the matter for the court's consideration.

32. Mention on 18/2/2020 for resentencing.

33. Orders accordingly.

Dated, Signed and Delivered at Siaya this 20th day of January 2020

R.E.ABURILI

JUDGE

In the presence of:

Appellant in person

Mr. Okachi Senior Principal prosecution Counsel for the Respondent/ State

CA: Brenda and Modestar